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Supreme Court
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No. _____ OFFICE OF THE CLERK

In The
Supreme Court of the United States

STEVE EDWARD ROACH,
Petitioner,

v.

DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

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Dated: August 30, 1999

12 pp

THIS IS A CAPITAL CASE

QUESTIONS PRESENTED

1. When a State's law requires a proportionality review of death sentences by its highest court, does a defendant under sentence of death have a constitutional right to due process of law in the manner in which that review is conducted?

2. Are there constitutional minimum standards of evidence required to sustain the claim that a capital defendant would be a future danger to society sufficient to justify the death penalty?

3. In determining whether a person convicted of capital murder deserves the death penalty under the "future dangerousness aggravator," does it comport with the defendant's due process rights to ask the jury a conditional question while denying it critical information about the premise?

4. Is a capital defendant effectively denied his constitutional right to a fair trial when the judge erroneously

instructs the jury at the sentencing stage that it had to be unanimous in its decision, when applicable laws require that only a sentence of death, but not life, be unanimous? and

5. Does a person aged under 18 at the time of his arrest have a constitutional right to an individualized assessment of his maturity and responsibility before he may be transferred from juvenile court for trial as an adult?

STATEMENT OF CORPORATE AFFILIATIONS

Petitioner Steve Edward Roach is an individual; Respondent is an official of the Government of the Commonwealth of Virginia.

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Petitioner Steve Edward Roach respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit, affirming the order of the United States District Court for the Western District of Virginia, denying his petition for a writ of habeas corpus.

OPINIONS BELOW

The decision of the Fourth Circuit of which review is sought is reported as *Roach v. Angelone*, 176 F.3d 210 (4th Cir. 1999). *See* the Appendix hereto ("App."), pp. 1a-29a.

Petitioner was convicted of capital murder and sentenced to death by the Circuit Court of Greene County, Virginia, in 1995. The conviction and sentence were upheld on direct appeal by the Supreme Court of Virginia. *Roach v. Commonwealth*, 468 S.E.2d 98 (Va. 1996). App., pp. 30a-59a. This Court denied certiorari. *Roach v. Virginia*, 117 S.Ct. 365 (1996). App., p. 60a.

A State habeas corpus petition was unsuccessful: the Commonwealth Supreme Court rejected it in an unpublished opinion on April 30, 1997. This Court again declined review. *Roach v. Angelone*, 118 S.Ct. 713 (1998). App., p. 61a.

The United States District Court for the Western District of Virginia on July 28, 1998, refused to issue a Federal habeas corpus writ, App., pp. 62a-83a. Its decision was affirmed on appeal by the Fourth Circuit. App., pp. 1a-29a. When reconsideration and en banc review of the panel decision were denied on June 1, 1999, App., p. 84a, the Greene County, in hearing conducted by telephone, ordered that Petitioner would die on August 25, 1999. App., pp. 85a-86a.

Meanwhile, on June 11, 1999, the Virginia Supreme Court issued its opinion in *Commonwealth v. Baker*, No. 982102 (*per curiam*), holding that both of the parents of a juvenile defendant must be provided actual notice of his proposed

certification to stand trial as an adult, and that convictions obtained in violation of that right are void. On August 6, 1999, the Supreme Court of Virginia accepted the appeal in *Roach v. Commonwealth*, Record No. 991817, consolidated it with a habeas corpus petition filed *sub nom. Roach v. Director*, No. 991816, and stayed Petitioner's sentence of death. App., pp. 87a-91a. Briefing in those cases is currently underway, and oral argument is scheduled for September 15, 1999.

JURISDICTION

Reconsideration and en banc review of the panel decision in the Fourth Circuit were denied on June 1, 1999. The mandate of the court of appeals was issued promptly thereafter. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provision at issue is 28 U.S.C. § 2254, which is set out in the Appendix at pp. 92a-94a.

STATEMENT OF THE CASE

A. Introduction

This case seeks review of a death sentence imposed on Petitioner, 17 years of age at the time of the crime of which he was convicted, by the Commonwealth of Virginia. Petitioner was sentenced to death for the murder of his neighbor, Mary Anne Hughes, on December 3, 1993.

After the jury returned a verdict of guilty of capital murder, Petitioner was condemned on the strength of the "future dangerousness aggravator" – that is, jurors found, beyond a reasonable doubt, the probability that Petitioner "would represent a continuing serious danger to society." *See* Code of Virginia § 19.2-264.2.[1]

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[1]The trial judge removed from the jury's consideration the "aggravator" based on the "vileness" of the crime. Va. Code § 19.2-

Petitioner's entire criminal record prior to the murder of Mary Anne Hughes consisted of two joyriding incidents (along with vehicle offenses), a single breaking-and-entering, and a violation of the terms of his parole. No evidence of future dangerousness was published to the jury beyond this.

In reviewing this sentence in compliance with Virginia law mandating "proportionality review," the Commonwealth Supreme Court held that "while there are exceptions, juries in the Commonwealth generally impose the death sentence for crimes comparable or similar" to Petitioner's. This conclusion was reached despite the uncontroverted fact that no other Virginia defendant sentenced to death on the future dangerousness aggravator, since the reinstatement of the death penalty in 1976, had nearly so light a record of violent behavior, nor was any crime for which such a sentence was upheld less indicative of a propensity to violence.

Petitioner respectfully submits that the Virginia Supreme Court, although required by State law to review proportionality, must do so in accordance with federal due process guarantees, and it failed to do so in this case. Petitioner's jury was also impermissibly denied the answer to its express question regarding the alternative to the death penalty, in violation of this Court's teaching in *Simmons v. South Carolina*, 512 U.S. 154 (1994); that the judge misled the jury as to the consequences of a lack of unanimity in sentencing; and that Petitioner was denied constitutional rights in the application of the Virginia statute regarding the transfer of juveniles to stand trial as adults. On each of these issues, the court of appeals below confirmed errors of constitutional magnitude, which, if unreviewed by this Court, will cost Petitioner his life.

B. Facts

264.4(C) (Michie 1995). He allowed the "future dangerousness" aggravator to be presented, although he noted that the case was "on the far spectrum" even with respect to that issue.

The essential facts of this case are not in dispute, and are summarized adequately in the decision of the court of appeals below.

On the night of December 3, 1993, according to his confession, Petitioner Steve Edward Roach – who had never before committed a criminal act of violence against another person – without provocation, deliberation, or warning, killed his 70-year-old neighbor, Mary Hughes, with a single shotgun blast. At the time, Petitioner was 17 years old. Six weeks before his nineteenth birthday, he was convicted of capital murder, and was sentenced him to death for the crime.

In May 1993, Petitioner had gotten into trouble with the police for the first time in his life. He was found guilty in juvenile proceedings of auto theft, and of driving violations, when he found a car on the street with keys in the ignition. He was convicted of breaking and entering a private residence and stealing a pistol on June 11, 1993. Nobody was home, and no one was hurt or threatened. And he committed a second theft, on August 2, 1993, again of a car with the keys left in it.

That was Steve Roach's entire criminal record, before the killing of Mary Hughes. No misconduct involved weapons or violence. There was no record of abuse of alcohol or drugs. He was sentenced to house arrest for the juvenile offenses, was placed under certain probation restrictions.

The evidence presented at the trial indicates that, having seen Ms. Hughes at her kitchen table on December 3, 1995, Petitioner impulsively decided to rob her. He knocked on the door, and, when Ms. Hughes answered, wordlessly killed her with a single, point-blank shotgun blast. There was no indication of a struggle, and the nature of her injuries suggests that Ms. Hughes died instantly. Petitioner took cash, credit cards, an ATM card, and car keys. He then fled in her car, ultimately stopping in South Carolina.

Three days later, Roach returned to Virginia on his own initiative. He contacted the Sheriff of Greene County, waived

his *Miranda* rights, and made a full confession, which formed the basis for the case against him.

On May 13, 1994, the Greene County Juvenile Court issued a transfer order certifying him for trial as an adult. After that order was vacated and the case remanded for further proceedings, the juvenile court conducted a second hearing, on July 22, 1994, and again transferred the case.

On October 11, 1994, a grand jury returned indictments against Roach for the capital murder of Ms. Hughes, and also for robbery and the unlawful use of a firearm. Petitioner was tried in the Circuit Court of Greene County, Virginia, on February 28 and March 1 and 2, 1995. Judge Lloyd Sullenberger presided. The jury found him guilty of all charges.

The sentencing phase lasted less than a day. On March 3, 1995, the jury fixed the sentence at death, finding beyond a reasonable doubt the probability that Petitioner would represent a continuing serious danger to society. *See* Code of Virginia § 19.2-264.2.

On May 9, 1995, in accordance with the jury's verdict, Petitioner was sentenced to death for capital murder, to life imprisonment for robbery, and to three years incarceration for the unlawful use of a firearm in committing a murder.

C. The Decision Below

The Fourth Circuit affirmed the decision of the district court, denying a petition for a writ of habeas corpus under 28 U.S.C. § 2254.

The circuit court correctly noted that there is no federal constitutional right to a proportionality analysis, and that the federal courts have no role in the interpretation of State statutory law. But the court erred in concluding, on this basis, that the mere recitation by the State court that it conducted a proper analysis is sufficient to sustain the conclusion that it actually did so. In this case, such a comparison cannot have

been conducted: if it had, death penalty in this case could not have been found to be proportionate, given both Petitioner's record and the facts of the murder of which he was convicted.

The circuit court dismissed Petitioner's other arguments essentially holding that each sought to have the bench substitute its judgment for that of the jury.

REASONS FOR GRANTING THE WRIT

1. Petitioner Was Denied Due Process in the Manner in Which the Supreme Court of Virginia Carried Out the Proportionality Review Required by Virginia Law.

In *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980), this Court held that "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." The Eighth Amendment requires procedures to narrow the class of persons to be condemned to death, to ensure that capital punishment is doled out fairly and consistently.

The Constitution does not dictate any particular method of achieving these goals. The way of doing so adopted in Virginia is comparing each capital case with others of like characteristics. This Court has held that States are not obligated to assess the proportionality of death sentences. *Pulley v. Harris*, 465 U.S. 37, 50-51 (1984). They may determine that sentencing is fair and equitable by other methods. Whatever mechanism they do elect, however, the Constitution requires that they carry it out in accordance with due process principles. And therefore, there is an important federal interest in the application of the test under State law.

States that require proportionality analyses of capital sentences must, therefore, actually provide them, or they will be denying due process of law to defendants in a manner violative of the federal Constitution. The Commonwealth Supreme Court must determine whether a death sentence "is excessive or disproportionate to the penalty imposed in similar

cases, considering **both** the crime **and** the defendant." Va. Code § 17-110(C)(2) (emphasis added). By assigning this responsibility to its highest court, Virginia has brought its proportionality review mechanism within the ambit of Fourteenth Amendment protection. It must conform to due process principles: it may not be omitted, or corrupted, or infected by prejudice. *Evitts v. Lucey*, 469 U.S. 387, 401 (1985).[2]

In reviewing the penalty of death to which Petitioner had been sentenced, the Virginia Supreme Court first referred to some 16 cases involving robberies in which it had affirmed death sentences on the grounds of future dangerousness. Those were cases compiled in *Yeatts v. Commonwealth*, 410 S.E.2d 254, 267-68 (1992), and in *Chichester v. Commonwealth*, 448 S.E.2d 638, 652 (1994), *cert. den.*, 115 S. Ct. 1134 (1995), as well as additional cases decided after *Chichester*: *Chandler v. Commonwealth*, 455 S.E.2d 219, *cert. den.*, 116 S. Ct. 233 (1995), and *Joseph v. Commonwealth*, 452 S.E.2d 862 (1995). And it noted, without citation, that it had "also reviewed the records in capital murder cases in which robbery was the underlying offense and a sentence of life imprisonment was imposed."

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[2]In *Evitts*, this Court taught that when a State chooses to take discretionary action, it must do so within the bounds of due process. The Court wrote that:

> [f]or instance, although a State may choose whether it will institute any given welfare program, it must operate whatever programs it does establish subject to the protections of the Due Process Clause. . . . Similarly, a State has great discretion in setting policies governing parole decisions, but it must nonetheless make those decisions in accord with the Due Process Clause. . . . In short, when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause.

469 U.S. at 400-01 (emphasis added) (citations omitted).

The court then wrote:

> Based on this review, we conclude that, while there are exceptions, **juries in this Commonwealth generally impose the death sentence for crimes comparable or similar to Roach's murder of Mrs. Hughes.** Roach killed an elderly, defenseless friend with a shotgun at point blank range in the process of robbing her of her social security funds. This crime, like the other death sentence crimes we have reviewed, shows extreme cruelty and lack of respect for human life.

Roach v. Commonwealth, 251 Va. 324, 351, *cert. den.*, 117 S. Ct. 365 (1996) (emphasis added) (parallel citations omitted).

Petitioner respectfully submits that there is no conceivable way in which the key half-sentence in this section of the opinion highlighted in bold above can be inferred from the material available to the Court. What happened here, therefore, was not merely an incorrect application of Virginia law, but an outright denial of any meaningful proportionality review. This resulted in an arbitrary deprivation of the liberty interest created by the Commonwealth, and therefore constitutes a denial of the due process of law.[3]

Looking at the very cases that the Virginia court said that it considered – those compiled in *Yeatts* and *Chichester*, plus *Chandler* and *Joseph* – Petitioner submitted to the courts below a chart displaying the characteristics of all of the offenders and their crimes. Of the 16 individuals whose death sentences based on the future dangerousness aggravator were affirmed, every one had a record involving assault or robbery, usually

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[3] *See, e.g., Wilkins v. Bowersox*, 933 F. Supp. 1496 (W.D. Mo. 1996) (granting a writ of habeas corpus because, among other things, the Supreme Court of Missouri did not perform a meaningful proportionality review).

involving deadly weapons.[4] At least nine had prior convictions and served substantial sentences for crimes of violence. At least six had histories of drug dependence or distribution. None was less than 20 years old at the time of the offense.[5]

None of these offenders was "comparable" to Steve Roach aged 17, with no violent history, and no record of abuse of drugs. Regarding the crimes of the 16 individuals whose cases the Supreme Court reviewed, not one consisted of only a single (albeit deadly) shot. Most involved egregious, sadistic violence: multiple murders or attempts, slashings, mocking helpless victims in the last seconds of their lives. In every one, there was a substantial period of time in which the victim was terrified, confronting an armed man obviously intent on violence. None of these offenses can therefore be said to be "comparable" to that of Steve Roach.

Petitioner and his counsel are confident that this Court will not hear in this submission any disrespect for the life of the person he was convicted of killing, or any minimization of the impact of her death on her family and community. The point is that, for a proportionality review to accord with the due process rights of a convicted capital murder defendant, more must be said than that he is a killer, and that his deed

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[4]Also in the record is a chart reflecting the 58 individuals convicted in Virginia of capital murder in theft cases, but sentenced to life imprisonment. Perhaps some of these are the cases whose records the Virginia court "also reviewed": there is no way of knowing. It is hard to find in this list of individuals **not** sentenced to death, even **one** whose history of violence was less substantial than Petitioner's. Moreover, 58/74 = 78% of apparently comparable defendants were sentenced to life and only 16/74 = 22% to death. Even if the court identified the proper "universe of comparables," it is impossible to infer that Virginia juries "generally" impose death sentences on defendants like Petitioner.

[5]Although Virginia law expressly includes the defendant's age as a matter the jury may consider in mitigation, Va. Code § 17-110(C)(2), that the Commonwealth Supreme Court considered Petitioner's case to be most "comparable" to those of a set of offenders all of whom were over 18 further undermines the reliability of its proportionality analysis.

shows contempt for human life. The Supreme Court of Virginia said that it had reviewed the available data, and from them inferred that "juries in this Commonwealth generally impose the death sentence for crimes comparable or similar to Roach's murder of Mrs. Hughes." **But no actual review of those cases, no actual assay of comparable defendants and comparable crimes, can have led to that conclusion.**[6]

Petitioner respectfully submits not that the Virginia Supreme Court performed the analysis assigned to it by State law incorrectly or inadequately, but that it did not do it at all. A determination of proportionality entails **comparison**: evaluating the defendant and the crime alongside other materially similar defendants and crimes. The Commonwealth court cannot have performed such an analysis in this case and reached the result that it did, since on both of the relevant criteria – the defendant's record of violence and the sheer badness of the criminal offense – this case is unique in the annals of Virginia death penalty jurisprudence.

The death penalty sentencing process established by the Virginia General Assembly directs that State's Supreme Court to evaluate each **defendant** and his sentence, *inter alia* in relation to similar **defendants** in similar situations. *See* Va. Code § 17-110(C)(2). This is within the range of sound constitutional practice. *Pulley*, 465 U.S. 37, 43. Steve Roach's record contains far less indication of propensity to violent criminality than that of any person ever sentenced to death in Virginia since capital punishment was reinstated in 1977. And the act of killing Mary Hughes, however reprehensible, involved no more violence than what was required to come within the definition of capital murder. Thus on **both** of the

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[6]The court below taxed Petitioner with asking it to "look behind" the State court's review. App. 11a. This is **exactly** what Petitioner seeks, since he contends that he has a constitutional right to actual due process, not to a mere recitation that due process has been granted. Even if the Constitution does not require such a review, *Walton v. Arizona*, 487 U.S. 639, 656 (1990), it assuredly does not preclude it.

scales laid down by statute as the "subject matter" of the required proportionality analysis, this case is at or beyond the extremes of those cases with which comparison is to be conducted.[7]

But the Virginia court limited its consideration to whether Petitioner's punishment was justified by the crime he was convicted of committing. *Id.* This is not the proportionality review required by State law, and violated Petitioner's rights under the Eighth and Fourteenth Amendments to the United States Constitution.[8]

The denial of Petitioner's due process right to an actual comparison of his record and his crime to others similarly situated (whether the outcome is favorable to him or not) is unfortunately not unique. Between 1977 and the affirmance of Roach's sentence on March 1, 1996, the Virginia Supreme Court has affirmed death verdicts against 95 individuals, including some affirmed more than once. And it had never until that time found, even once, that a death sentence was excessive or disproportionate. "Proportionality review," that is, had never removed a Virginia defendant from death row.

The Virginia court's steadfast refusal to reverse any death verdicts thwarts Justice White's prediction in *Gregg v. Georgia* that, over time, as aggravating circumstances requirements were applied, "the types of murder for which the death penalty may be imposed [would] become more narrowly

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[7]In *Solem v. Helm*, 463 U.S. 277, 289 (1983), this Court approved the following factors to analyze whether a sentence is proportionate "to the crime for which the defendant has been convicted" under a repeat offender statute: (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other defendants convicted in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions. *Id.* at 290-94.

[8]*Pulley v. Harris*, 465 U.S. at 54-59 (Stevens, J., concurring); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242, 251 (1976); *Jurek v. Texas*, 428 U.S. 262, 276 (1976); *Zant v. Stephens*, 462 U.S. 862, 876-77 and n.15 (1983).

defined and [would be] limited to those which are particularly serious or for which the death penalty is peculiarly appropriate." 428 U.S. 153, 222 (1976). The opposite has occurred in Virginia; the opposite has occurred in this case. The death sentence imposed on Petitioner is so disproportionate to the outcomes in other comparable cases in Virginia that it cannot be justified in that manner.

The approach of the Virginia Supreme Court is constitutionally flawed. Since nearly **every** combination of predicate offenses and aggravating factors has produced at least **one** affirmed death sentence, apparently sufficient to sustain conclusions about what juries "generally" do, the court cannot **ever** find a death sentence to be disproportionate. Nor did it even take into account Petitioner's confession or the remorse that he expressed for Mary Hughes's death, although in a number of "comparable" cases, **lack** of remorse was expressly held relevant to the court's affirmance of death sentences.[9]

The Virginia court, during its perfunctory review, never stated how Roach and his crime resembled the 16 death-affirmed cases it apparently considered comparable, but not the 58 cases resulting in life sentences.[10] Because the court failed to do so, simply stating its conclusion as an empirical matter

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[9] *See, e.g., Murphy v. Commonwealth*, 246 Va. 136, 146 (1993); *Thomas v. Commonwealth*, 244 Va. 1, 24-25 (1992); *Clark v. Commonwealth*, 220 Va. 201, 210-11 (1979); *Saunders v. Commonwealth*, 242 Va. 107, 116 (1991); *Williams v. Commonwealth*, 234 Va. 168, 181-82 (1987); *Beaver v. Commonwealth*, 232 Va. 521, 536 (1987); *Strickler v. Commonwealth*, 241 Va. 482, 497 (1991); *Frye v. Commonwealth*, 231 Va. 370, 393 (1986).

[10] In fact, the court has never articulated a basis for comparison among cases, even when it has expressly mentioned specific ones in which capital punishment was not decreed (as it did not do here). *See, e.g., Joseph v. Commonwealth*, 249 Va. 78, 93 (1995); *Chandler v. Commonwealth*, 249 Va. 270, 284 (1995).

with no citation to evidence or precedent, Petitioner did not receive meaningful review of the propriety of his death sentence. *Parker v. Dugger*, 498 U.S. 302 (1991). A proportionality review must consider all relevant factors relating to the defendant as well as the crime, including those that might mitigate the offense or the offender's moral responsibility, as well as the array of outcomes in other cases. *Clemons v. Mississippi*, 494 U.S. 738 (1990); *Tuggle v. Netherland*, 516 U.S. 10 (1993). This was not done, with the inevitable results.

2. The Evidence Submitted to the Jury at the Sentencing Phase Was Insufficient as a Matter of Constitutional Right to Justify a Sentence of Death on the Grounds of Future Dangerousness.

A Virginia jury must find at least one of two aggravating circumstances before it can impose a sentence of death:

> The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

Va. Code § 19.2-264.4(C) (Michie 1995). Not only did the Commonwealth present evidence inadequate as a matter of law to support a finding of future dangerousness in this case, but the evidence that it attempted to muster was insufficient, as a matter of law, for the trial court even to have allowed the jury

to consider the issue in the first place. The inadequacy of the evidence constituted a denial of Petitioner's right to a fair trial.

The statute dictates that the jury may not impose a sentence of death unless it finds a probability of future dangerousness after consideration of **the defendant's past criminal record of convictions**. *Id.*, § 19.2-264.2. Although inferences may be drawn from the circumstances of the criminal act for which the defendant is on trial, the law does not permit future dangerousness to be determined based on that single crime alone.

Steve Roach was convicted and sentenced for having committed a terrible act. At the same time, however, it is important to recognize that, just as there are degrees of homicide crimes, there are degrees of capital murder. The very existence of the vileness aggravator as one of the means of supporting a death sentence constitutes recognition of gradations attending even such grievous crimes. To pass the vileness threshold, Virginia courts have required conduct "more culpable than the minimum necessary to accomplish an act of murder." *Edmonds v. Commonwealth*, 229 Va. 303, 313 (1985), citing *Smith v. Commonwealth*, 248 S.E. 2d 135, 149 (1978), *cert. den.*, 441 U.S. 967 (1979).

The circumstances surrounding this murder cannot support a capital sentence. Ms. Hughes was shot a single time. She was not sexually assaulted or physically abused in any other way. There was no struggle, and no evidence that she suffered before or after she was shot. She was the only victim. Although the shooting was, in and of itself, a terrible thing, it was "the minimum necessary to accomplish an act of murder." *Edmonds*, 229 Va. at 313.

None of Steve Roach's juvenile offenses prior to the killing of Mary Hughes involved violence, controlled

substances, or the use or threatened use of a weapon.[11] This paltry record cannot support a finding of the likelihood that Petitioner "would commit criminal acts of violence that would constitute a continuing serious threat to society."

In stark contrast are those reported cases in which the evidence was found, on appeal, to be sufficient to support a finding of future dangerousness. Each involved a history of significant criminal activity, and a pattern of horrific violence. *See, e.g., Hoke v. Commonwealth*, 377 S.E.2d 595, 600-01 (1989), *cert. den.*, 491 U.S. 910 (1989), and 502 U.S. 880 (1991) (attempted arson, carrying a concealed weapon, "assaults, jump[ing] people, beat[ing] them with things just to collect money together for a dope deal or something"); *Royal v. Commonwealth*, 458 S.E.2d 575, 576 (1995), *cert. den.*, 116 S.Ct. 823 (1996) (assault and battery, interfering with a police officer, possession of cocaine); *Edmonds v. Commonwealth*, 329 S.E.2d 807, 814 (1985), *cert. den.*, 474 U.S. 975 (1985) ("going after his girl with an ax," "cutting" someone, five convictions for assault and battery); *Poyner v. Commonwealth*, 229 Va. 401, 427, 329 S.E.2d. 815, 833 (1985), *cert. den.*, 474 U.S. 865, 106 S.Ct. 189, 88 L.Ed.2d 158 (1985) (19 convictions, including assault on a police officer, three capital murders, robbery, use of a firearm); *Spencer v. Commonwealth*, 393 S.E.2d 609, 622 (1990), *cert. den.*, 498 U.S. 908 (1990) (three similar murders); *see also Wright v. Commonwealth*, 427 S.E.2d 379, 393 (1993), *cert. granted on other grounds*, 512 U.S. 1217 (1994), 450 S.E.2d 361 (1994), *cert. den.*, 514 U.S. 1085 (1995) (17-year-old defendant, with prior convictions for first degree murder and attempted first degree murder, committed another murder during an attempted rape).

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[11]The record indicates that he violated the terms of his probation also by possessing a gun. Interestingly, however, the Greene County Sheriff's Office itself returned the gun to him just days before the shooting, after Roach had voluntarily surrendered it. In Greene County, apparently, firearm possession is a parole violation so technical that it is not even noticed by the police.

Steve Roach's scant record simply cannot justify assimilating him to these violent and dangerous men.

No witness offered **any** testimony supporting the contention that Petitioner had a propensity to be dangerous. Even the man whose house Petitioner had burglarized offered no suggestion that he saw Roach as any sort of threat, let alone "a continuing serious threat to society."

The Commonwealth put on no other evidence during the sentencing phase. Even the trial judge, while denying the defense motion to keep the future dangerousness aggravator from the jury, acknowledged on the record that the Commonwealth's case was extremely weak.

Since the Commonwealth was not permitted to argue that the circumstances of Mary Hughes's murder gave rise to the vileness predicate, the case for the execution of Steve Roach turned entirely on its ability to find in a record of juvenile delinquency a continuing, serious threat of criminal acts of violence posing a future danger to society. No evidence was introduced to support that claim, however, and it is unsupportable as a matter of law.

3. Petitioner Was Denied Constitutional Due Process Rights When His Sentencing Jury Was Not Permitted to Know the Alternative to the Death Penalty.

During the penalty phase of Petitioner's trial the Court instructed the jury, *inter alia*:

> Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt the following aggravated circumstance, that after consideration of his history and background, there is probability that he **would** commit criminal acts of violence that **would** constitute a continuing serious threat to society.

Emphasis added. Immediately following instructions, a juror posed a question, which was read aloud to counsel in the absence of the jury: "Does life in prison mean with no chance of parole or truly life in prison, or is he eligible for parole?"

The trial court further instructed the jury as follows:

> The question, does life in prison mean with no chance of parole, or truly life in prison, or is he eligible for parole? . . . Having found the defendant guilty, you should impose such punishment as you feel is just under the evidence and within the instructions of the Court. You are not to concern yourselves with what may happen afterwards.

Essentially, the court refused to answer the juror's question, although at least that juror recognized that a decision concerning the penalty of death, turning on evidence of future dangerousness, depended upon a premise which had been left unspoken: what would be the conditions of Petitioner's life were he allowed to live? The juror wanted to know what the judge and counsel for both sides already knew: that a sentence of life imprisonment for Steve Roach would preclude eligibility for parole until 25 years had passed.

In *Graham v. Collins*, 506 U.S. 461 (1993), Justice Souter, in dissent, warned of the quagmire that might result from such an incomplete staging of instructions during the penalty phase of a trial following conviction of a capital offense, when future dangerousness is at issue. He noted

> that the trial judge's remarks at voir dire may have inappropriately left the jury to consider whether Graham would have been dangerous in the future **if he were set free.** . . . In light of my conclusion that Graham's death sentence should be vacated, I need not address here the propriety of sentence imposed on the basis of future dangerousness to the public when there

> is no possibility that a defendant will be sentenced to a term less than life without the possibility of parole.

506 U.S. at 518 n. 10 (Souter, J., dissenting).[12]

One term after *Graham*, this Court in *Simmons v. South Carolina*, 512 U.S. 154 (1994), considered a capital case from a State which, unlike Virginia at the time, provided by statute for the sentence of "life without parole."[13] Simmons's prosecutors successfully sought the death penalty on the grounds of a future dangerousness aggravator similar to Virginia's. Justice Blackmun, with three Justices concurring and three concurring in the judgment, wrote:

> The Due Process Clause does **not** allow the execution of a person "on the basis of information which he had no opportunity to deny or explain." *Gardner v. Florida*, 430 U.S. 349 at 362 (1977). In this case, the jury reasonably may have believed that petitioner could be released on parole if he were not executed. To the extent this misunderstanding pervaded the jury's deliberation, it had the effect of creating **a false choice** between sentencing petitioner to death and sentencing him to a limited period of incarceration. This **grievous misperception** was encouraged by the trial court's refusal to provide the jury with accurate information regarding petitioner's

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[12] *Graham* was a Texas case, and Texas law has no sentence of "life without parole." Justice Souter's reference to there being "no possibility" of a term less than life without parole, therefore, cannot be limited to cases with no **legal** chance of such a sanction, but must refer to the **factual** improbability of its being imposed.

[13] Virginia law was amended in 1994 to abolish parole for capital offenses committed after January 1, 1995. Va. Code § 53.1-165.1

> parole ineligibility and by the State's repeated suggestion that petitioner would pose a future danger to society if he were not executed. . . . The State thus succeeded in securing a death sentence on the ground, at least in part, of petitioner's future dangerousness, while at the same time concealing from the sentencing jury the true meaning of its non-capital sentencing alternative, namely, that life imprisonment meant life without parole. **We think it is clear that the State denied petitioner due process.**

512 U.S. at 161-62 (emphasis added).

Justice Souter, concurring, found additional support in the Court's consistent interpretation of the Eighth Amendment, to the effect that accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant should be put to death or allowed to live in prison, citing *Gregg v. Georgia*, 428 U.S. 153, 190 (1976). He further reasoned:

> That same need for heightened reliability also mandates recognition of a capital defendant's right to require instructions on the meaning of the legal terms used to describe the sentences. . . . Thus, whenever there is a reasonable likelihood that a juror will misunderstand a sentencing term, a defendant may demand instruction on its meaning, and a death sentence following the refusal of such a request should be vacated as having been "arbitrarily or capriciously" and "wantonly and . . . freakishly imposed." *Furman v. Georgia*, 408 U.S. 238, 249 (Douglas, J., concurring).

Simmons, 512 U.S. at 172 (Souter, J., concurring). The requirement that instructions in capital cases need to be especially clear is a further illumination of the basic principles

set down in *Bollenbach v. United States*, 326 U.S. 607, 613 (1946), in which this Court held that "[c]onviction ought not to rest on an equivocal direction to the jury on a basic issue."

Here, the basic and only issue at the sentencing phase was the "probability of future dangerousness." Yet the jury was not to learn the fact that, were they to allow Roach to live, he would have no contact with society outside prison for at least 25 years. Nor is this of merely theoretical interest: the question that the judge refused to answer indicates its importance to at least one juror, and probably to more.

Simmons demonstrates that the term "future dangerousness," in capital sentencing schemes like Virginia's, is actually a misnomer: Petitioner's jury could not reasonably answer questions about the "future" of the person to be sentenced without more information than they were given.

The anomaly of reading *Simmons* as requiring the statutory availability of the sentence of life without parole is clearly seen by contrasting *Simmons* itself with the case at Bar. In *Simmons*, the defendant had a right to have his sentencing jury know that, if not executed, he would spend the rest of his life behind bars. Here, Respondent would have the Court conclude that the failure to inform the jury of Petitioner's parole ineligibility for a minimum of 25 years entails no denial of due process. Yet the alternative sentences in the cases of Simmons and Roach are far more similar than different.

Both Simmons and Roach, if allowed to live, would spend the next quarter-century in prison: the South Carolina and Virginia statutory schemes treat them identically for that period of time. The difference arises only after the 25-year minimum term in Virginia is elapsed. On the first day of the 26th year following his sentence, Roach might[14] be set free; Simmons would surely wake up to another day behind bars.

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[14]The 25 year term of ineligibility does not mean, of course, that a life-sentenced inmate will always be released after 25 years, but merely that

So the difference between Simmons and Roach, in terms of the predicate for future dangerousness, is only with respect to what might happen in prison, for the first 25 years from sentencing, and outside only thereafter. The deliberating jury did not actually consider whether Petitioner "would" be a future danger to society during or after a term of 25 years behind bars. Virginia's argument was that Petitioner was dangerous now, not that he would be as a middle-aged man, well after the year 2015.

By statute, the Commonwealth's burden is to prove beyond a reasonable doubt "that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society." In any capital case, reasonable jurors may understand the question they must answer in dramatically different ways. Would he commit criminal acts of violence and constitute a continuing threat to society: (a) if given the opportunity to re-enter society at large, and to act without fear of apprehension? (b) if put back in the precise circumstances of his crime? (c) if locked behind bars for all or most of the rest of his life? or (d) if sentenced to prison for life and if provided treatment (or is he beyond redemption in this life)?

No guidance among these radically different understandings was tendered to the jury by Judge Sullenberger. Yet the gulf that separates interpretations (a) and (d), for example, is so wide that even a "unanimous" affirmative answer to the question does not imply the "certainty that the verdict rested on proper grounds" required by the Constitution. *See, e.g., Mills*, 486 U.S. at 376. Under *Boyde v. California*, 494 U.S. 370, 380 (1990), and its progeny, a reasonable likelihood of divergent application of standards is sufficient to sustain the conclusion that due process has been

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he can qualify for parole in the normal manner. In fact, it is extremely uncommon for capital murder defendants to obtain parole at or shortly after the time they become technically eligible.

denied. And such a likelihood is present here, as the language of the question put to the jury itself reveals.

It is true that certain State courts, including the Supreme Court of Virginia,[15] and at least the Fourth and Fifth Circuits, *Wilson v. Greene*, 155 F.3d 396 (4th Cir. 1998), *Allridge v. Scott*, 41 F.3d 213 (5th Cir. 1994), *cert. den.*, 514 U.S. 1108 (1995), have read *Simmons* as limited to cases in which a defendant is ineligible for parole forever, as a matter of law.

This strained interpretation finds authority in but a single sentence -- indeed, a single word – of the plurality opinion. Justice Blackmun wrote: "The logic and effectiveness of petitioner's argument naturally depended on the fact that he was **legally** ineligible for parole and thus would remain in prison if afforded a life sentence." 512 U.S. at 165 (emphasis added).[16] But it is hard to see why the legal rather than the factual reasons for the defendant's parole ineligibility should be determinative. What Simmons – and what Roach here – sought to show was simply that he would be behind bars and not on the streets: forever in the case of *Simmons*, and for a very long time in the case at Bar. Future dangerousness, in either instance, has to be assessed on real assumptions, not on the false premise that the convicted defendant might soon return to the general public.

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[15]Not all State courts have thus erred in interpreting *Simmons*, however. The Supreme Court of New Mexico, in *Clark v. Tansy*, 882 P.2d 527 (N.M. 1994), held that a capital defendant has the right to have the jury accurately informed of the actual length of the prison term that would be alternative to death, including even such conditional factors as "good time."

[16] In *Wilson*, 155 F.3d at 407, and below, App. 16a-18a, the Fourth Circuit purported to find authority for its narrow reading of *Simmons* in the opinion of O'Connor, J., on behalf of herself and two other Justices. But the repeated reference to Simmons's parole ineligibility as a matter of law in the O'Connor opinion merely reflected the record before the Court in that case. Nowhere did Justice O'Connor suggest that the legal, as opposed to factual, impossibility of parole for Simmons was the deciding factor.

Simmons was addressed by the Supreme Court of Virginia on direct appeal, but that court regrettably misinterpreted its import, centering its conclusion on the distinction between Roach's theoretical "eligibility" for parole (albeit after a quarter of a century), and Simmons's permanent "ineligibility" as a matter of law. *Roach*, 468 S.E.2d 98 (1996). The Virginia court did not indicate why this is relevant to the issue of future dangerousness, even though the fact that Roach would be under 24-hour armed guard for a minimum of 25 years is not. Nor did it explain why "the effect incarceration might have on Roach" was a subject of "**improper** speculation," while speculation about future dangerousness in the abstract, counterfactually divorced from awareness of the real alternative to death, apparently is "proper."

Petitioner seeks here an interpretation of *Simmons* consistent with its logic and true to its premises. Justice Stevens and three other Justices recently indicated, in *Brown v. Texas*, 118 S.Ct. 355 (1997) (*mem.*), that in their view, *Simmons* has been misconstrued in State and circuit court decisions. In *Brown*, the alternative sentence for the capital defendant was a minimum of 35 years in prison without parole. Like Roach, he sought to let the jury know this fact. And like Judge Sullenberger, Brown's trial judge refused to give this information to the jury.

In a "memorandum respecting the denial of a petition for a writ of certiorari," Justice Stevens noted that "[t]here is an obvious tension between this rule and our basic holding" in *Simmons*. He described the Texas (and Virginia) rule as "**perverse**," and stated that it "**unquestionably** tips the scales in favor of a death sentence that a fully informed jury might not impose." *Id.*, at 356, emphasis added.

Justice Stevens backed up this conclusion not only by appeal to the logic of *Simmons* itself, but also by empirical data that show how much more likely it is that a jury will let a defendant live if there is no chance of his emerging from

prison anytime soon.[17] As Justice Scalia noted in his dissent in *Simmons*, the difference between a long term of imprisonment and total parole ineligibility is a difference of degree, not of kind. *Simmons*, 512 U.S. 154 at 179-80 (Scalia, J., dissenting). Justice Stevens suggested that the circuit courts should develop additional jurisprudence in this area before this Court's inevitable review.[18] Petitioner respectfully submits that the matter is now ripe.

Petitioner respectfully submits that, under the logic of *Simmons*, his jury should have been permitted to know that a "life" sentence in his case would mean no less than 25 years, and that the 19-year-old teenager before them would be a 44-year-old man before he had any chance of release into society if they were to let him live.[19] Withholding that information

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[17]Public support for the death penalty drops by as much as half when imprisonment with a long period of parole ineligibility is the alternative. Bowers, Vandiver, & Dugan, "A New Look at Public Opinion on Capital Punishment: What Citizens and Legislators Prefer," 22 Am. J. Crim. L. 77 (1994). A substantial portion of the jury-eligible population of the Commonwealth believes that rigorous sentences are routinely reduced or waived, and that "life" sentences are actually very brief. Note, "The Meaning of 'Life' for Virginia Jurors and Its Effect on Reliability in Capital Sentencing," 75 Virginia Law Rev. 1605, 1636 (1989).

[18]The Tenth Circuit has opined that Petitioner's reading of *Simmons* is now "arguable," after *Brown*, although it declined to go along with the argument of a petitioner who was sentenced before Simmons. *Moore v. Reynolds*, 153 F.3d 1086 (10th Cir. 1998), *cert. den.*, 119 S. Ct. 1266 (1999). Moreover, at least one Judge of the Fourth Circuit has opined that his colleagues' view of *Simmons* and its progeny is "wrong," and that its import is an open question. *Wilson*, 155 F.3d 396, 417 (Michael, J., concurring in the judgment).

[19]That some jurors might have attempted to divine the future dangerousness of Steve Roach on the impossible assumption that he would be out of prison directly, while others thought in terms of his overpowering a guard in his maximum security cell, obtaining a firearm, and committing acts of violence within the prison, itself leads to the conclusion that the "future dangerousness" determination is inherently unreliable, in precisely the way prohibited in *Woodson v. North Carolina*, 428 U.S. 280 (1976).

from the jury systematically ensured that they were "clearly misinformed" "about the real implications of their sentencing alternatives."

It is well settled that jurors may be asked to look into the future, but to determine probabilities in an informed manner, they must understand those conditions of the future that are fixed. This Court, in *Jurek v. Texas*, noted that "any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose." 428 U.S. at 274. A sentencing jury in a capital case must be able to consider "[t]he defendant's potential for reform and whether his probable future behavior counsels against the desirability of his release into society." *California v. Ramos*, 463 U.S. 992 (1983).

It is more probable than not that at least one juror believed that Steve Roach, if allowed to live, would be eligible for parole within a few years. The reasonable likelihood of such a misunderstanding means that his sentence violated Petitioner's right to the due process of law. *See Boyde v. California*, 494 U.S. 370 (1990). That alone means that the reliability of the death sentence was and is significantly diminished. *See Beck v. Alabama*, 447 U.S. 625, 638 (1980).

"To give the jury an instruction in the form of . . . words that are hopelessly ambiguous . . . would effectively grant it an unbridled discretion to impose the death penalty." *Godfrey v. Georgia*, 446 U.S. 420, 437 (1980) (Marshall, J., concurring). Such unregulated power is unconstitutional. *Furman v. Georgia*, 408 U.S. 238 (1972). A sentence delivered on the basis of such an instruction must be set aside.

4. Petitioner Was Denied His Constitutional Right to a Fair Trial When the Judge Erroneously Instructed the Jury at the Sentencing Stage About the Need for Unanimity and the Consequences of Failure to Achieve It.

The trial court also erred seriously in its charge to the jury at the sentencing phase. After testimony in support and in

rebuttal of the "future dangerousness aggravator," the Judge instructed the jury on the deliberation process. His instructions were inconsistent with Virginia law, and denied Petitioner fundamental constitutional rights.

After explaining that the Commonwealth must prove beyond a reasonable doubt the premise of the "future dangerousness" aggravator, Judge Sullenberger told the jury:

> if the Commonwealth has failed to prove that circumstance beyond a reasonable doubt, then you shall fix the punishment of the defendant at, one, imprisonment for life, or two, imprisonment for life and a fine for a specific amount, but not more than $100,000. **Any decision you make regarding punishment must be unanimous.**

Emphasis added. Under the statute, however, the jury must agree unanimously on a death sentence, while on a failure of unanimity, the sentence is life. Va. Code § 19.2-264.4(E). The instruction that "[a]ny decision you make regarding punishment must be unanimous" is absolutely unfounded in the law of Virginia, and is an error of Constitutional dimension.

As Justice Blackmun wrote for this Court in *Mills v. Maryland*, 486 U.S. 367 (1988):

> The decision to exercise the power of the State to execute a defendant is unlike any other decision citizens and public officials are called upon to make. Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case. The possibility that petitioner's jury conducted its task improperly certainly is great enough to require resentencing.

486 U.S. at 383-4. The "possibility" to which Justice Blackmun alluded in *Mills* is here a probability, since jurors were instructed that to find mitigation they had to be unanimous.

The few Virginia cases expressly on point are clear and univocal in their agreement: State law makes life imprisonment the "default option," automatically imposed if the jury cannot agree unanimously on death. *Eaton v. Commonwealth*, 397 S.E.2d 385, 398 (1990), *cert. den.*, 502 U.S. 824 (1991). The instruction in this case reversed the burden of proof, and told the jury that Petitioner had to persuade all of them that one or more mitigating factors obtained. Such a reversal is unconstitutional. This Court "has held that, where the underlying statute does not require unanimity, due process will not tolerate instructions that could reasonably be interpreted by a jury to preclude consideration of any mitigating factor unless such factor was unanimously found to exist." *Mak v. Blodgett*, 970 F.2d 614, 625 (9th Cir. 1992).

In *McKoy v. North Carolina*, 494 U.S. 433 (1990), the Court struck down a North Carolina sentencing scheme requiring jury unanimity to determine mitigating factors. It rejected a false symmetry: that the State must prove aggravating factors to a unanimous jury does not mean that the defendant has to carry the same burden on mitigation. *McKoy*, 494 U.S. at 442-444; *Perry v. Lynaugh*, 492 U.S. 302, 327-28 (1989). Justice Blackmun, concurring in *McKoy*, explained *Mills* further: the "instructions were held to be invalid because they were **susceptible** of two plausible interpretations, **and under one of those interpretations the instructions were unconstitutional.**" 494 U.S. at 445 (Blackmun, J., concurring) (emphasis in original).

Mills and *McKoy* concerned jury instructions which insisted on unanimity as to a particular circumstance of mitigation, rather than as to the presence of any mitigating factor. But the result is that a sentencing scheme may not constitutionally impose on the defendant the burden of persuading all 12 jurors that he does not deserve to die. That is

precisely what Petitioner's jury was told. Just as in *Lockett v. Ohio*, 438 U.S. 586 (1978), the risk that the penalty imposed here was erroneous demands resentencing.

This is not a case like *Komahrens v. Evatt*, 66 F.3d 1350, 1364 (4th Cir. 1995), *cert. den.*, 116 S.Ct. 1575 (1996), or *Arnold v. Evatt*, 113 F.3d 1352, 1363 (4th Cir. 1997), *cert. den.*, 118 S.Ct. 715 (1998). There, the court of appeals held specifically that a reasonable jury could not have inferred the need to find mitigating factors unanimously. Petitioner's jury was told that any decision it reached -- that is, for death or for life – had to be unanimous. This cannot be reconciled with the teachings of this Court in *Mills* and *McKoy*.

Nor does this case resemble *DeLong v. Thompson*, 790 F. Supp. 594 (E.D. Va. 1991), *aff'd* (*mem.*), 985 F.2d 553 (4th Cir. 1993). In *DeLong*, there was no constitutional violation, because the jury was "expressly informed . . . that the decision to impose the death sentence had to be unanimous." Then it was told: "[W]hen I say that you must be unanimous, you must be unanimous if you impose the death penalty. Anything short of unanimous is life imprisonment." 790 F. Supp. at 610. The information given to the *DeLong* jury was precisely what was withheld here: that unless each was affirmatively persuaded, beyond a reasonable doubt, that the defendant merited execution, he would be sentenced to life in prison. Unlike *DeLong*, this case presents the very "possibility that petitioner's jury conducted its task improperly" that this Court in *Mills* found to be "certainly . . . great enough to require resentencing." 486 U.S. 367, 384 (1988).

This argument is in no way precluded by the recent decision of this Court in *Jones v. United States*, 119 S. Ct. 2090 (1999). In that case, interpreting the death penalty provisions of Federal law, 18 U.S.C. § 3594, Justice Thomas opined for a 5-4 Court that an error similar to that of Judge Sullenberger did not raise constitutional issues. That conclusion was premised, however, on the fact that "[t]here is no reasonable likelihood that the jury applied the instructions incorrectly." 119 S. Ct. at

2103. The Court found that, as a matter of probability, no one was misled: the petitioner's view was based on inference, and negative inference at that. Here, by contrast, the error of law was express, and the room for misunderstanding obvious.

5. Petitioner, Aged under 18 at the Time of His Arrest, Was Denied His Constitutional Right to an Individualized Assessment of His Maturity before Being Transferred for Trial as an Adult.

American law has long recognized the fundamental differences to be accommodated in determining the rights and obligations of children, especially in the context of criminal law. *See New Jersey v. T.L.O.*, 469 U.S. 325, 350 n.2 (1985). In the law's eyes, children are less experienced and more impetuous than adults, and are not as able to evaluate the consequences of their conduct. They are, therefore, in general less blameworthy for their transgressions, in the literal sense of the word. *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988).

To pass constitutional muster, a State's laws must provide a fair basis for evaluating the juvenile's culpability, responsibility, and maturity before having him tried as an adult. That determination must provide "individual consideration," a "constitutional requirement." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978); *see also Stanford v. Kentucky*, 492 U.S. 361 (1989); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Bellotti v. Baird*, 443 U.S. 622 (1979). The Eighth Amendment, applicable to the States through the Fourteenth, prohibits the infliction of "cruel and unusual punishment," understood according to the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

"Individualized consideration," of course, is a constitutional requirement in all criminal cases, not just those that might result in a sentence of death, and not just those involving juveniles. *Lockett*, 438 U.S. 586, 605; *Zant v. Stephens*, 462 U.S. 862, 879 (1983). But it is particularly essential in cases of young offenders facing execution.

This Court has mandated this individualized analysis in juvenile cases prior to the decision to transfer the case to adult court. In *Stanford v. Kentucky*, 492 U.S. 361 (1989), the Court noted that "the determination required by juvenile transfer statutes to certify a juvenile for trial as an adult ensures individualized consideration of the maturity and moral responsibility of 16- and 17-year-old offenders before they are even held to stand trial as adults." *Stanford*, at 375.

Under Virginia's statute in effect at the time of Petitioner's transfer, the juvenile court had to find only probable cause to believe that he had committed the delinquent act as alleged. Va. Code § 16.1-269 (Michie 1994).[20] Yet the death penalty, "unique in its severity and irrevocability," is an excessive and constitutionally unacceptable punishment for a juvenile who lacks an adult's maturity and blameworthiness. *Gregg v. Georgia*, 428 U.S. 153, 197 (1976).

An individualized evaluation of blameworthiness, rather than an expression of abhorrence at the crime, was missing in this case. The juvenile court based the transfer only on the seriousness of the offense and the inability of the juvenile justice system to incarcerate Petitioner for a long period of time. Such a transfer cannot be reconciled with the teachings of this Court, for example in *Stanford*, at 375.[21]

CONCLUSION

For all of the foregoing reasons, Petitioner Steve Edward Roach respectfully prays that a writ of certiorari be issued by this Court to the United States Court of Appeals for the Fourth Circuit, and that the opinion of that court be reversed.

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[20]This statute was repealed in 1994, after the proceedings at issue in this case.

[21]While Virginia allows for consideration of age as a mitigating factor, Virginia Code § 19.2-264.4 (B), no instruction regarding age was given at trial.

Respectfully submitted,

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